IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 25 OF 2006

Mr. Vyanjkatesh Y. Gaonkar,
r/o Badem, Assagao,
Bardez-Goa. ... Petitioner

versus

1. State,
   Represented by P.P.

2. Smt. Dropadi D. Phadte,
   r/o H. No.659, Badem,
   Assagao, Bardez-Goa. ... Respondents

Mr. A. D. Bhobe, Advocate for the Petitioner.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent No.1.

Ms. Kataky Kim, Advocate for the Respondent No.2 under the Legal Aid Scheme.

CORAM : N. A. BRITTO, J.

DATE : 23RD NOVEMBER, 2006.

ORAL ORDER

Heard Mr. A. D. Bhobe, the learned Counsel on behalf

of the petitioner and Ms. Kataky Kim, the learned Counsel on behalf of the respondent no.2/Informant.

2. There is no dispute that the dispute between the petitioner and the said informant is regarding a coconut tree which belongs to and is situated in the property of the petitioner and is at a distance of about three meters away from the house of the said informant, as stated by the ZAO(Zonal Agricultural Officer). Although, the said tree is at that distance, it appears that its trunk leans towards the house of the said informant and its canopy is spread over the roof of the house of the informant as a result of which dried coconuts and leaves fall on the house of the said informant.

3. The informant filed an application dated 8-4-2004 to the Executive Magistrate/Mamlatdar alleging that the said tree was dangerous and was leaning over her residential house and the coconuts of the same were damaging her roof, causing her heavy loss which she was unable to bear. Pursuant to the said application dated 8-4-2004 a conditional order was issued to the petitioner.

4. Thereafter, the inquiry proceeded and upon the conclusion of the inquiry, the learned Executive Magistrate by his Order dated 26-5-2006 was pleased to confirm the conditional Order dated 3-8-2004 directing the petitioner to cut the said coconut tree within a period of fifteen days from the date of the Order. In coming to the said conclusion, the learned Executive Magistrate, inter alia, observed that the coconut tree was dangerously leaning on the house of the informant, thereby endangering the lives of the inmates and the petitioner had not led any evidence to prove to the contrary. The learned Executive Magistrate also noted that along with the imminent danger of the likelihood of the falling of the said coconut tree there also existed continuous nuisance of the coconuts and dry coconut leaves on the house of the informant thereby posing continuous danger to the lives of the inmates, etc.

5. The petitioner filed a revision against the said Order dated 26-5-2006 of the learned Executive Magistrate and the learned Ist Adhoc Additional District Judge who dealt with the revision, relying upon the Judgment of this Court in the case of **Smt. Maria Jesus Fernandes** v. **Shri Ganpat L. Naik and**

another in Criminal Miscellaneous Application No.113 of 2001 came to the conclusion that the facts of the case were akin to the facts of the said case of **Smt. Maria Jesus Fernande**s v. **Shri Ganpat L. Naik and another**(supra) and therefore proceeded to dismiss the revision at the same time making a further order that upon the failure of the petitioner to cut the said coconut tree within a period of fifteen days from the date of his order, the informant/State would be at liberty to cut the said coconut tree at the State/informant's cost and expenses and to appropriate fallen coconut trees and the coconuts of the same by the State/informant.

6. The learned Adhoc Additional District Judge also held that the State/informant was also entitled to recover the expenses incurred towards the cutting of the coconut trees from the petitioner, if he desired in accordance with law.

7. Mr. Bhobe, the learned Counsel on behalf of the petitioner has submitted that there was nothing in the evidence of the informant or for that matter the Zonal Agricultural Officer even to remotely suggest that there was likelihood of the said

coconut tree falling on the house of the informant and it is his submission that this evidence has been ignored by both the Courts below.

8. On the other hand, the learned Counsel Ms. Kim on behalf of the informant has submitted that there are concurrent findings of fact rendered by both the Courts below and therefore this Court may not interfere with the concurrent findings in its extraordinary jurisdiction. In reply, Mr. Bhobe has placed reliance on the Judgment of this Court in the case of **Shri Gajanan Majik** v. **State**(2006 ALL MR(Cri) 671) wherein it was stated thus:-

> "There is no doubt that there are concurrent findings of guilt given by both the Courts based on evidence produced by the prosecution. Concurrent findings are good but justice is better. There is no doubt that the Revisional Court is empowered to exercise all the powers conferred on the Appellate Court by virtue of the provisions contained in Section 401 of Criminal Procedure Code but at the same time it is to be seen that this power cannot be exercised as a second appellate

> power. However, when both the Courts below over look essential parts of evidence and base their conclusions upon extraneous matters or when both the Courts fail to notice basic and glaring features in the evidence of the witnesses which tantamount to gross miscarriage of justice this Court is certainly entitled to interfere in exercise of its revisional jurisdiction".

9. Section 133 of the Code(Cr.P.C.,1973), inter alia, provides for cutting down of a tree which is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighborhood or passing by. It certainly does not provide a remedy for cutting of the tree which cause nuisance or damage to houses by the fall of its coconuts or dry leaves and in this context, it may be observed that the observation of the learned Executive Magistrate that there existed continuous nuisance of falling of the coconuts and also dry leaves on the house of the informant was irrelevant for deciding the controversy within the powers given by Section 133 of the Code. The remedy for that malady would be by way of a Civil Suit. The learned Additional Sessions Judge was certainly

not right in coming to the conclusion that the facts of the case were similar to those found in the case of **Smt. Maria Jesus Fernandes** v. **Shri Ganpat L. Naik and another**(supra unreported decision of this Court in Criminal Miscellaneous Application No.113 of 2001). In that case, the Assistant Agricultural Officer had opined that the tree was weak and there was possibility of the tree uprooting due to strong winds. However, that is not the case herein. In this case, the ZAO had stated that the tree was healthy. He had not at all opined that there was any likelihood of its falling. In his evidence before the Executive Magistrate, the ZAO had confirmed the contents of his report and had stated that the tree was healthy and was about 35 years of age. There was nothing in his evidence even to remotely suggest that the tree had become unhealthy or weak or was likely to fall. He was asked whether the tree would fall with heavy rains or breeze, a question which he declined to answer. In the case at hand, there was nothing in the evidence of the ZAO to even remotely suggest that there was a danger or likelihood of the disputed tree falling over the house of the informant. That apart, the evidence of the informant also did not show that there was any such likelihood. The evidence of the

informant was read with the assistance of the learned Counsel. In the said evidence, the informant has not stated that the said tree was likely to fall for any reason whatsoever. All that she has stated is that the coconuts from the said tree fall on her house and over the rooms where they have their meals and other things and on account of the coconuts falling on their house the tiles and beams get damaged. In cross-examination, the said informant had specifically admitted that in case the coconuts and the leaves are plucked on time within a months period then there would not be any danger or nuisance to her house. She had further stated that the petitioner was not plucking the coconuts for months together which was causing the danger to her house. In other words, the entire evidence of the said informant clearly demonstrates that her grievance was one of damage being caused to her on account of the falling of the coconuts and leaves from the said trees on account of non removal of the same in time by the petitioner. The remedy to prevent such damage is by way of a civil suit. Proceedings under Section 133 of the Code are not intended to settle private disputes between two parties such as this. Section 133 of the Code provides for a summary and quick remedy, inter alia, for cutting down of a tree which is likely to

fall. The learned Courts below appear to have ignored the essence of the evidence given by the informant and the expert opinion of the ZAO and have come to the conclusion that the tree was required to be cut when the informant had failed to demonstrate that the said tree for some reason or other was likely to fall. The tree in question was hardly about 35 years of age. There is no doubt that whether a particular tree is likely to fall cannot be foretold with any degree of accuracy but certainly some evidence must be produced to show that a particular tree is likely to fall either because it has developed a crack or is infested or suffers a disease or weakness or other infirmity, etc. which would make it to fall. The danger of falling must be *in praesenti* and in normal weather conditions and not in distant future since one cannot foretell as to what could happen in abnormal weather conditions. Only because the said tree was leaning towards the house of the informant was insufficient to conclude that it was likely to fall. A coconut tree generally leans towards a house with a view to get more sunlight and such trees inspite of their inclination towards a house live for scores of years. The existence of coconut trees in this State is a common feature, in rural and semi urban areas. Coconut trees live for

about a century and remain fruit bearing for 5 to 6 scores of years. Normally, they do not get uprooted or fall. Their mischief value is not much. A similar view was expressed in **G. Devi and another** v. **Jaganath Nayak and another**(1983(2) Crimes 146). People have them leaning over their own houses. They don't cut them because they are likely to fall. All that they do is to take precautions so that damage is not caused to the tiles of the roof by replacing the relevant part of the roof with zinc sheets. The problem crops up when the tree does not belong to the person who owns the house.

10. The expression "likely" appearing in Clause (b) of sub-section 133 has not been defined in the Code and its ordinary dictionary meaning is, as per Concise English Dictionary, such as well might happen or be true, promising, probably.

11. Proceedings under Section 133 of the Code are not meant to settle private disputes between two members of the public and yet it is seen that many parties waste their time and money in prosecution of such proceeding when the remedy is by

way of a civil suit. Although the proceedings are initiated on tshe information given by a private party they are essentially between the Magistrate on one side on behalf of public at large and the person against whom they are taken.

12. Consequently, the petition deserves to succeed and the orders of both the Courts below are required to be set aside and are hereby set aside with no order as to costs.

N. A. BRITTO, J.

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